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Abstract

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Keywords

Constitutional law--Interpretation and construction; Canada

AN ESSAY ON CONSTITUTIONAL INTERPRETATION*

BY NOEL LYON**

The Article sets out a theory of interpretation where the *Charter* reflects an authoritative standard of public policy. It is not to be used only as a test of legality but as a test of legitimacy. Section 35 of the *Constitution* on aboriginal rights offers an opportunity in which the *Charter's* central concept of fundamental justice in the context of a free and democratic society can be applied to break out of sterile common law conceptions and interpretations. The questions of legitimacy and public policy are instrumental to the way we govern ourselves.

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I. INTRODUCTION

We tend to neglect the obvious, and because fundamentals seem obvious to us, we quickly move past them to more challenging, technical tasks ... to specifics. What could be more obvious, for instance, than the nature of a free and democratic society to people who have lived in one all their lives? And did we not invent fundamental justice?

Because fundamentals of constitutional law are taken for granted, we tend to assume that they are fully incorporated into our technical analysis and given the primacy that is their due. If they are as pervasive to our constitutional doctrine as we believe, there is no need to check the results of factual inquiries and legal reasoning against them.

Our retreat into the technical and the specific is too hasty. This is especially evident in the case of a document such as the *Constitution Act, 1982*,[1] which has profound implications for our future because of the way it has changed some of the fundamental ideas on which our constitutional thinking is based. Business as usual is not an adequate response to a document that entrenches a charter of rights and freedoms, affirms aboriginal rights, and introduces a supremacy clause which subordinates even legislatures to the *Constitution*.

The *Constitution Act, 1982* is a whole document whose integrity is important for putting into perspective important questions of interpretation. The *Charter of Rights and Freedoms*[2] and Part II[3] (aboriginal rights) express a vision of society as we would like it to be. We deny ourselves the full, guiding value of

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[1] *Constitution Act, 1982*, being schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

[2] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

[3] *Rights of the Aboriginal Peoples of Canada*, Part II of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

that vision by moving too quickly to the technical and the specific as though the document were just another legal enactment.

The approach to interpretation offered here is neither technical nor rigorous. It is an attempt to draw on the best in our legal tradition, on things that we ignore or forget as we become ever more deeply immersed in the technical business of matching words and phrases to precedents and other guides to legal usage. We are already well down the road to a new specialty called Charter Law. In this paper, I will attempt to give persuasive reasons why we should develop a different approach and to indicate what that approach should be.

II. THE THEORY

A certain amount of annotation is required to support the assertion that the *Charter* and the rest of the *Constitution Act, 1982* do not speak for themselves. However, a vast quantity, as is customary, is not needed. What the *Charter* does need is some breathing space, a chance to develop a life of its own in a natural, gradual way.

The *Charter* is an historic document destined to become one of the great original sources of our legal system. It is also the start of a new stage in our development as a free, responsible society that is committed to the ideal of justice. The document is therefore entitled to be heard in its own words before it becomes encrusted with the explanatory words of commentators.

The first question that agitates us is whether the *Charter* applies to private conduct; can it be enforced directly against citizens as well as governments? Section 32 says that the *Charter* applies to the Parliament of Canada, all of the provincial legislatures, and all of the governments that go with those legislative bodies. However, that is not clear enough for us. Non-inclusion need not import exclusion, we say cleverly. What use is there, we argue, in securing fundamental rights and freedoms against interference from governments if the same protection is not available against private conduct? Then we add, *in terrorem*, that in this age of huge corporations, computers, and mass communication, private

concentrations of power may be larger and more dangerous than governments.

This is a false argument. It asks us to assume that if the *Charter*'s protection does not run against private conduct, our fundamental rights and freedoms are left exposed to private interference. While it is true that the common law was nurtured more on property than freedom, it did nevertheless develop a system of civil obligations as well as criminal prohibitions for the protection of individual rights and freedoms. Also, where the common law failed to move quickly enough, the protection of law has been extended by legislation. Human rights legislation, which provides legal sanctions against private discrimination, is perhaps the best example.

So it seems likely that the *Charter* means what it says. Its guaranteed rights and freedoms are enforceable in the courts only against governments. The question we *should* be asking is whether the *Charter* is a proper source of standards (evidence of public policy) in cases between private parties. However, as long as we see the *Charter* as simply an enumeration of legal rights, this question need not be asked. Before we can regard the *Charter* as a general source of law, we must come to think of it as an authoritative statement of fundamental community values.

Everything about the *Charter* — its form, language, history, and political context — speaks of an important original source of law. As part of the *Constitution* of Canada, it is supreme law. Ordinary laws must yield to it when they conflict. The common law, with its preference for crisp rules, has always regarded public policy as an unruly horse. The *Charter*, however, is a special case. It is an historic document in which we have declared ourselves on matters of fundamental importance. It is the responsibility of judges to ensure that common law doctrine and statute interpretation are developed and applied in ways that do not undermine the supreme law of the *Constitution*. To the extent that the *Charter* speaks intelligibly about matters within the purview of the common law or statute interpretation, it trumps precedent, however old and venerable.

This is the *Charter*'s proper "application" to private conduct. The question is not whether the *Charter* is "in" or "out," but whether it provides an authoritative standard or evidence of public policy

relevant to the matter in dispute. If it does, common law doctrine and the rules of statutory construction are seldom so clear and fixed as to preclude an interpretation that is in harmony with the *Charter*. If a conflict does arise, the ordinary rules of precedent require that the highest authority be followed. This is no longer Parliament or the Supreme Court of Canada. It is the *Constitution*.

Where conflict between supreme law and ordinary law is serious, the *Charter* may provide a sufficiently clear statement of public policy to serve as authority for revising doctrine. What was formerly rendered unto Parliament must now be rendered unto the *Constitution*. Common law and Equity fixed a system of values in the legal system, and judges have done their best to adjust the system to changing community standards and circumstances. As incremental change became increasingly inadequate, legislation became the dominant method of adjusting the system as well as the most important source of law. Before 1982, it was supreme law for most purposes. Now a new, comprehensive source that displaces legislation as supreme law has been introduced. Our fixation with questions such as whether the *Charter* "applies to" private conduct may prevent us from grasping that there exists before us one of those rare historic documents whose mission is to refashion our laws and institutions and, through them, our society.

The *Charter* cannot just be slipped into a new compartment in the legal mind marked "Charter Law." It must become an integral part of the legal consciousness if it is to take its proper place in our constitutional evolution. There is a cathedral under construction in Barcelona which is expected to take at least one hundred and fifty years to complete. No living person will witness its completion. There is an analogy there with the *Constitution Act, 1982*. Similarly it is not given to us or to any other generation to fulfil the promise of the *Charter*. The "instant annotations" that began to appear even before the *Charter* came into force are a bit like the booms and derricks of the modern pre-fab construction industry. We mean to take possession of the *Charter* and complete construction of the new *Constitution* as quickly as possible, as though it were an exposition site or a hydroelectric project.

Aboriginal peoples apparently do not feel the need for this kind of social engineering. They seem to believe that if they live according to the standards of conduct their culture prescribes, their

communities will be strong and resilient. Social evolution will find its own way, naturally developing under wise leadership, not as a continuing battle to win acceptance of community standards and to overcome the damage resulting from failure to observe them. Perhaps these durable cultures with their patient, tolerant people can provide clues as to how we can come to understand a legal document of our own time as an historic document, not just a bowl of legal fortune cookies.

The perspicacity of aboriginal peoples' perception of the significance of the events of 1982 is evident in their attempt to block patriation of the *Constitution* until their historic claims were settled. Their "constitutional express train" rolled into Ottawa with protesters, and their lawyers went to the Chancery Division of the English Supreme Court to seek a declaration of outstanding British obligations to aboriginal peoples to be met before the final transfer of all legal powers to Canadian authorities. But to no avail. The same morality that denied their humanity and their cultures' validity in the seventeenth century prevailed to deny the legitimacy of their claim to be part of the events of 1982. Once again they were excluded from decisions affecting them in fundamental ways.

Fortunately, the aboriginal peoples were able to secure a commitment to a just resolution of their claims in the form of recognition and affirmation of their aboriginal and treaty rights. That is section 35 of the *Constitution Act, 1982*, and it gives us a way of viewing the *Charter* that can help to subordinate some of the cleverness and opportunism of legal analysis to the kind of wisdom and integrity that has allowed aboriginal cultures to survive.

The actual words of section 35 are "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." The language used is not very specific and is the type that provides a field day for lawyers. However, the context of 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown. Those courts were bound to legitimize every sovereign act of suppression of aboriginal cultures. That kind of arrangement has

nothing to do with justice as conceived by the *Constitution Act, 1982* and by international standards to which Canada is committed. The old rules embodied in precedent are therefore not helpful when it comes to translating the words of section 35 into reality.

Section 35 is a solemn commitment to honour the just land claims of aboriginal peoples, fulfil treaty obligations, and respect those rights of aboriginal peoples which the *Charter*, aided by international law, recognizes as their fundamental rights and freedoms. What else could it be? Constitutional reform is not done to continue the status quo.

Section 35 is an extraordinary law and we will learn much as it is implemented, just as the Americans have learned much from the equal protection clause in the 14th amendment to their constitution. The experience will help to restore the integrity of a document which has already been fragmented into neat boxes of courtroom ammunition. We hardly know how to begin such an exercise that will take us back to the great tradition that nurtured Equity, a time when, in the words of William Least Heat Moon, "time and men and deeds connected."[4]

To European eyes, the common law has been generous to aboriginal peoples. It has recognized their traditional way of life by formulating a right to hunt, fish, and gather on unoccupied Crown land which was once their undisputed territory. In the United States, it even accorded them a measure of sovereignty. More recently, in the *Calder*[5] case, the Supreme Court divided evenly on the question of whether the Nishgas hold land rights to the Nass Valley of British Columbia. If the question goes before the Court again, the Judges could, by adopting the interpretation of Mr. Justice Hall, recognize and enforce these aboriginal land rights. However, it has been the Dene Nation of the Northwest Territories who have cleared the way to a full understanding of what was at stake in the intense battle to have aboriginal rights entrenched in the *Constitution*. The Dene have refused to bring their land claims

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[4] William Least Heat Moon, *Blue Highways: A Journey Into America*, (Boston, Toronto: Little, Brown and Company, 1982), at 5.

[5] *Calder* v. *A.-G. British Columbia* (1973), [1973] S.C.R. 313, [1973] 4 W.W.R. 1.

before the courts on the ground that those courts were established by an intruding foreign government with no legitimate authority over the Dene territory. The Dene understand that courts established by the Crown will ultimately accept without question an express assertion of title to land that is made by the Crown. The whole purpose of courts is to preserve the order established by the sovereign power of the state.[6]

Those were the ground rules followed by the courts up to 1982. The question now is whether the Supreme Court of Canada, if called upon to interpret section 35, would feel bound to follow the precedents on aboriginal rights or would see in that provision a recognition of aboriginal rights defined in accordance with the *Constitution*'s standard of free, self-governing peoples, and modern standards of international law concerning subject peoples.

If the Dene are right, then the first fundamental right of aboriginal peoples is the right of self-determination. That means looking to aboriginal cultures to define the full range of fundamental rights and freedoms. To apply the *Charter* directly to aboriginal peoples would in itself be a violation of the right of self-determination, for the *Charter* is neither of their making nor to their liking. However noble its language and intent, the *Charter* is a product of European culture. It is no more their fundamental law than the *Indian Act*[7] is their tribal law. This conclusion is abhorrent to legalists, who, like nature, abhor a vacuum. But a modest measure of cultural humility will allow us to understand that there is no vacuum. Section 35 is for aboriginal peoples what the *Charter* is for the new Canadians. There is a vacuum only if we lack the will and the imagination to complete the work that was begun when section 35 was hastily drawn up and inserted in the Joint Resolution of 1981. The irony of that concession to aboriginal peoples is that it was made so that their interests would not hold up the acting out of the final chapter in transplanting European culture to their land.

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[6] Mel Watkins, *Dene Nation, The Colony Within* (Toronto: University of Toronto Press, 1977).

[7] *Indian Act*, R.S.C. 1970, c. 1-6.

We can note then, as an aside, one reason why aboriginal culture is worth saving: it can teach us something of the virtues of patience and tolerance.

We have arrived at a new way of seeing the *Charter*. We must probe beyond its language to find its soul in order to understand how to draw from aboriginal cultures the equivalent traditions and ideas that are of fundamental importance. To do this we will need the help of aboriginal peoples, for only they can speak with authority for their collective vision of the world. The idea of non-native judges proceeding to "interpret" section 35 armed with books of precedent and anthropology, is once again repugnant to the fundamental right of self-determination. The courts are not equipped to do the job, and it would be unfair to them and grossly unfair to the aboriginal peoples to lay the task at their door. However, we are slow to learn. Section 35 is supreme law, and if we fail to honour its commitment voluntarily, the Supreme Court will be forced to elaborate the aboriginal rights that have been affirmed. The cynic might observe that a strong motivation for failure in the political arena is the knowledge that the judges seem most unlikely to escape the legalism that has shaped their minds and find a legitimate approach that will allow them to give judicial effect to what we all know to be the compact of section 35.

The likelihood that the courts will in the end be called on to interpret section 35 is one reason for exploring alternatives to the usual methods of interpreting legal language, but there is an even better reason. In exploring alternatives, we may succeed in shifting the emphasis of constitutional interpretation away from words, and towards the values the document has tried to capture through those words.

The section-by-section approach to the *Charter* fails us here. What we need is a whole view of the document; its vision of society. I believe that the essence of the *Charter* is captured by Section 7:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Fundamental justice is the *Charter*'s central ideal. What follows section 7 is just an elaboration of that ideal. Cruel and unusual treatment, for example, is inherently repugnant to

fundamental justice, as is discrimination. Equality and language rights are the *Charter*'s particular formulations meant to counter the fundamental injustice of discrimination.[8] Life, liberty, and security of the person are the ideals of a free and democratic society, and what comes before section 7 is elaboration of the essential features of such a society. Section 1, which states an obvious truth about how rights and freedoms take their colour from their context, is excepted. Section 1 ought not to become the basis of a distinct "step" in the *Charter*'s interpretation, but should be seen as a pervasive guide to the interpretation of all rights and freedoms. It could have been omitted, leaving judges to infer it from the context in which they live, breathe, and work.

Equally, the *Charter* could have consisted of section 7 alone, leaving judges to work out the particulars of fundamental justice and of the right to life, liberty, and security of the person. But our legal tradition is otherwise. The more particulars we provide, the more confident and comfortable are those who interpret the law. Nevertheless, it is instructive to pause and contemplate a *Charter* containing only section 7, for it produces a different conception of the document. More importantly, though, it gives us a starting point for the elaboration of aboriginal rights into an equivalent set of fundamental rights and freedoms.

To a native North American, the right to life, liberty, and security of the person means a different set of arrangements than to someone of European origin. The collective vision and cooperative ethic that have been adopted by these old cultures do not fit the acquisitive, competitive outlook that brought Europeans to this continent in the first place. The North American instinct is to live in harmony with the natural world, not to conquer it. We can therefore state one more reason why aboriginal cultures are worth preserving: they offer very long experience in successful social organization and resource conservation.

The *Charter*'s particularizations of section 7 are largely alien to the North American experience. It is for this reason that we need to identify the *Charter*'s values as a first step in elaborating

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[8] *Charter*, *supra*, note 2 at ss. 12, 15, 16.

section 35 into an equivalent set of rights and freedoms for aboriginal peoples.

When the *Charter* sets out in sections 2 to 6 its fundamental freedoms, democratic rights, and mobility rights, it is pinning down the right of self-determination for Canadians. We are a free people, governing ourselves through representative institutions. The formulations reflect the European experience, which was a long struggle against tyrants, large and small, against the view that personhood and rights are the privilege of a few, not the birthright of all. The North American experience was different, at least until the Europeans arrived. No doubt there have been tyrants and acts of oppression in aboriginal cultures, but it is nonetheless true that their way of life is inherently democratic. Leadership is a burden rather than a prize. The extent of the differences and why they exist are questions best left to those peoples to answer for themselves. In so doing, they will identify the equivalent conditions that require constitutional protection if the collective and individual rights of self-determination are to be guaranteed to them as they are to other Canadians.

We can usefully speculate a bit about where this inquiry will lead. Anyone who has ever observed a band council meeting will know that in aboriginal communities, the right of free speech is not threatened in the same way as it has been in the feuding remnants of the Holy Roman Empire. It is assumed that all have a right to be heard, and the social habits that secure this right are probably more effective than legal sanctions that may secure rights only on paper. Accepted standards of conduct are a stronger bond of community than court orders. The cultural differences are subtle but powerful. It is not that the differences are clear and pervasive, but dominant trends are observable.

Take freedom of religion as another point of contrast between cultures. Among aboriginal peoples, religion is not a doctrine or particular activity, but a way of life. The beliefs that inform their vision of the world and their place in it are pervasive elements of their culture. The idea of religion as a severable kind of after-hours activity is foreign to that culture. The separation of church and state would be an absurdity. This insight could help the rest of us understand our own problems with religion. It might lead to further insights into the causes of social disintegration and

environmental degradation. Understanding of causes is the first step towards remedies.

The democratic right to vote, run for public office, and have regular sessions of representative legislatures look strange to native North Americans. Europeans must have serious character defects if they feel the need to entrench in their constitution a requirement that the community's chosen leaders meet in public from time to time to deal with matters of common interest. It can fairly be pointed out that the dominant culture in Canada is far more complex than any aboriginal culture, but complexity alone cannot explain the *Charter*. The record discloses a persistent reluctance to accept the restraints of a free and democratic society along with the freedoms. For all our patronizing of these primitive cultures, they may yet teach us something about community.

Aboriginal peoples have their own ways of securing fundamental freedoms and democratic rights that come from long experience of self-government. We may not understand or agree with all those ways, but if the consent of others is the condition of legitimacy, then the fundamental right of self-determination is gone and section 35 becomes a new entrenched *Indian Act*.

The likely result of working out the right of self-determination will be a situation in which each aboriginal community will reach a set of arrangements that works best for it. The linking of those arrangements to the larger political system from which extrication is no longer feasible can be done by an Act of Parliament, agreement, or constitutional amendment. That is a matter of form. What will matter is that the arrangements to secure life, liberty, and security of the person will have been worked out by the aboriginal peoples themselves in the exercise of their right of self-determination.

Does this mean that aboriginal peoples will be denied the fundamental rights and freedoms enjoyed by other Canadians under the Charter? Quite the contrary. Only by listening to native leaders and respecting their translation of the *Charter*'s values into fundamental aboriginal rights can we secure life, liberty, and security of the person for aboriginal peoples.

That inquiry will lead us to an aboriginal view of a free and democratic society. We turn next to an aboriginal conception of fundamental justice. No doubt there is much that is universal in the

Charter's particulars of fundamental justice, but for present purposes they are suspect. They look too much like a catalogue of human rights violations drawn from the European experience. Aboriginal cultures may have a broader vision of fundamental justice, one that can take us beyond the silly idea that the most important question is whether fundamental justice is a procedural standard only, or bears substantive content. An old Cree, Haida, or Mohawk is likely to tell us what should be obvious; the most important question is how one distinguishes what is fundamental from what is not. The *Constitution* guarantees those aspects of justice that are fundamental, probably in the belief that ordinary justice will thereby be reasonably assured. The *Constitution* can only do so much, and the word "fundamental" is used to characterize its limited role.

So the aboriginal peoples are entitled to arrive at their own particulars of fundamental justice, or to have none at all if they are satisfied that those entrusted with power and those who choose them will know when the limits are being pressed. Fundamental justice may have a common meaning among aboriginal peoples such that particulars are not required. The same may be true for the dominant culture, but when legal sanctions displace social sanctions, the need for particulars and precedents increases.

The right of self-determination carries with it the right of the group to hold its own vision of fundamental justice. The vision held by aboriginal peoples may seem to us less humane than ours, or possibly more humane, but it is theirs. In fact, it is unlikely to differ all that much in the ideal. It is also unlikely to be encumbered with the kind of legalism that would divert its force into debates about procedure and substance.

There is some opinion abroad that all this is the road to apartheid, the antithesis of freedom and human rights. That is a serious charge and I want to contest it. I argue that if apartheid sits at one end of the spectrum of human dignity, then the proposed elaboration of section 35 lies at the opposite end. In moving from one end to the other, one would pass through forced assimilation, under which a minority culture is accorded the same rights and freedoms as the majority, irrespective of whether those rights and freedoms respond to the values of the minority culture. Apartheid is forced exclusion, a denial of personhood, and with it the basic rights of freedoms that are taken for granted by those who are

included. Self-determination is the opposite of apartheid and is higher on the scale of human dignity than forced assimilation. Moreover, where the option of voluntary assimilation is always open, as is the case for Canada's aboriginal peoples, there is no basis for comparison to apartheid.

It is important that the apartheid issue be disposed of because there is still a residue of imperial sentiment in the land, urging that the best thing "we" can do *for* "them" is to force assimilation. We find it hard to accept the fact that subject peoples and the right of self-determination are real problems in Canada.

There are two ways of responding to the idea that section 35 should become the basis for a distinctive aboriginal charter of rights and freedoms. One is that it will complicate things horribly, lead to conflicting constitutional standards, and make it impossible to develop a coherent interpretation of the *Constitution*. The other is that it will enrich our society by providing us with a view of ourselves "through the looking glass" by way of comparison with cultures that have evolved through thousands of years' experience in the land we now share. I choose the latter response without hesitation because our experience with federalism and cultural duality suggests that diversity makes for vitality.

If we honour the commitment of section 35 and respect the aboriginal peoples' right of self-determination, the future will take care of itself. Coercion has been tried for two centuries and has been a costly failure. In a world where aboriginal cultures continue to fare badly, this could be our greatest national achievement to come out of the events of 1982.

The search for an understanding of section 35 has yielded a conception of the *Charter* that is worth pursuing. Section 7 becomes the essence of the document, and the surrounding provisions become an elaboration of the essence. Section 1 is seen as a declaratory statement, setting a general tone for interpretation, and the whole *Charter* becomes a guide to an understanding of aboriginal rights. This conception may lead us to see constitutional matters differently and to ask questions we did not ask before.

III. SECTION 7

Commentators have mainly treated section 7 as just one of the many *Charter* provisions to be interpreted according to its terms. Seeing it as a pivotal provision containing the central ideas that are elaborated in the other provisions gives us another way of looking at both section 7 and the *Charter* as a whole. The Supreme Court had difficulty with the language of section 7 in its early encounter with it in the cruise missile case.[9] The language of life, liberty, and security of the person is so general as to be universal. If meant as a definition of an enforceable legal right, it renders virtually every legislative enactment and executive act subject to judicial review for compliance with its standard. It is hard to imagine any act of government that does not in some way infringe on someone's life, liberty, or security of the person. The entire *Criminal Code*[10] is a set of restraints on everyone's liberty.

If section 7 is seen as a statement of the *Charter*'s essence, then the right to life, liberty, and security of the person can be taken as merely declaratory of that essence, serving at the same time as the platform on which the principles of fundamental justice are mounted. "Fundamental justice" is broad but not universal and is an appropriate standard to entrust to judicial power. Judges fashioned the whole body of Equity with no more to guide them than the standard of justice, or good conscience. Now the *Constitution* gives us fundamental justice as a new general standard for public law. It also provides a few examples to prime the judicial pump. The judges have a limited, but important part to play in making the whole body of public law accord with the new standard.

In this interpretation, the thrust of section 7 is directed through the principles of fundamental justice. This would free judges from the impossible task of containing the language of life,

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[9] *The Queen* v. *Operation Dismantle Inc.* (1983), [1983] 1 F.C. 745, 3 D.L.R. (4th) 193 (Fed. C.A.).

[10] *Criminal Code*, R.S.C. 1970, c. C-34.

liberty, and security of the person in a credible way, allowing them to give full expression to fundamental justice. The alternative is to give a restrictive interpretation to fundamental justice, adopting the view that it confers only procedural rights. The Supreme Court will make the choice, but in doing so the judges ought to consider how important are public perceptions of the *Constitution*. It is unlikely that citizens will take the *Constitution* seriously if they are told by their Supreme Court that fundamentally unjust laws are acceptable as long as they are applied to all in a fair and even-handed manner. Nor are thoughtful citizens likely to be persuaded that the provisions that follow section 7 exhaust the substantive content of fundamental justice.

Once again the rights formulations may be blocking our view of the *Constitution*. As an individual right, the right to be treated in accordance with fundamental justice has the potential to spawn a whole galaxy of precedents. As a constitutional standard, it has the potential to transform public law. The question for our theory of constitutional interpretation is which is the primary function of the *Constitution* and which incidental. The answer cannot come from the common law. It has its own theory to serve its own distinctive needs and purposes.

IV. SECTION 1

The idea that section 1 sets out a distinct test to be applied after an infringement of a *Charter* right has been established is an attractive one to analytical minds. It conforms to the orderly, step-by-step approach that allows complex matters to be broken down into components for sequential treatment. However, this analytical approach adds to the fragmentation of the section-by-section, encyclopedic approach of commentators, and we should consider the effect of this on the *Charter*'s integrity as a whole vision of society.

Not only does the *Charter* have its own internal coherence with section 7 as the nucleus, but it also has an historical and social context that is important to anyone trying to understand the document and its particular provisions. The character of fundamental rights and freedoms is inherently dependent on context.

The idea that a prima facie assessment of infringement can be made in the abstract, and the context of reality then applied separately to the result if an infringement is found may be the first step in taming the *Charter* so that it will fit the common law mode of reasoning. The *Canadian Bill of Rights*[11] was tamed by the "frozen concepts" approach,[12] after which it quickly became a dead letter.

One of the *Charter*'s principal objects may be the freeing of judicial minds from common law thinking so that they might fashion a modern human rights jurisprudence around the *Charter*'s vision of society. One way to subvert that object is to treat section 1 like a legislative enactment whose every word and phrase requires definitive explication.

If the *Charter*'s integrity as an historic document is essential to its success, then section 1 should be seen as merely declaratory of the proper approach to interpretation. Judges ought not to hang on each key word and phrase but should note simply that the section confirms the obvious fact that the content and limits of rights and freedoms are matters of context. They can then forget about section 1 and get on with the task of interpreting the *Charter* in context. The knowledge they need is not the true meaning of "reasonable" and "demonstrably justified," but rather the contours and dynamics of a free and democratic society in addition to many facts about the real world in which that society must pursue its vision.

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[11] *Canadian Bill of Rights*, S.C. 1960, c. 44, reprinted in R.S.C. 1970, App III.

[12] The "frozen concepts" approach takes literally the statement in section 1 of the *Canadian Bill of Rights* that the rights and freedoms set out in that section "have existed" in Canada, resulting in an interpretation of those rights and freedoms as codifying or "freezing" Canadian human rights law as of 1960. This would mean, for example, that the *Bill's* equality rights would be subject to a tavern owner's right to refuse to serve a black man because he is black, a right which the Supreme Court of Canada recognized in *Christie* v. *York Corporation* (1940), [1940] S.C.R. 139, [1940] 1 D.L.R. 81. The "frozen concepts" approach was prominent in *Robertson & Rosetanni* v. *The Queen*, [1963] S.C.R. 651, 41 D.L.R. (2d) 485, where the Court stated that freedom of religion in the *Canadian Bill of Rights* means the Canadian idea of freedom of religion that prevailed when the *Bill* was enacted. The other famous example of this approach is *A.-G. Canada* v. *Lavell*, [1974] S.C.R. 1349, 38 D.L.R. (3d) 481, where the Court decided that the *Bill's* right to equality before the law simply enacted Dicey's rule-of-law principle that the law must be applied in the same way to all persons to whom it applies.

Where dictionaries and digests prevail, the vision goes by default. Without sustained attention to the whole document and its purposes during the interpretive process, the *Charter* will be dismantled into sterile chunks of verbiage and absorbed by the general law. The experience of the *Canadian Bill of Rights* will be repeated.

The inquiries about context that are indicated by section 1 should be integral to the process of accommodating the *Charter*'s ideals to the complexities of the world as it is. The better the interpreter's understanding of context, the better the chance of interpretations moving the real world towards the ideal. Without context, interpretation of an abstract document like the *Charter* becomes guesswork. The risk of preconception and ideology disguised as common sense becomes great. Therefore, context is essential to interpretation from the outset and cannot be used as a kind of screen for preliminary conclusions.

The theory, then, is that the *Charter* is an integral document that calls for an integral approach to interpretation. That means an approach that is philosophical rather than analytical. The process of thinking through a suitable approach may help analytical minds make the transition to it.

V. CONSTITUTIONALITY

The concept of legality that shapes our thinking has itself been shaped by the doctrine of Parliamentary supremacy. Legality, as we know it, operates within the limits drawn by that doctrine. It is an hierarchical concept whose lines of authority are linear and whose mode of reasoning is analytical. It induces a response to the *Constitution Act, 1982* that is much the same as the response to an Act of Parliament. The important questions are where the document fits in the hierarchy and what sources are to be used to give us the meaning of the document's language. Questions about purposes and policies are incidental. They lie beyond the realm of legality and are therefore asked only when the sources leave doubt as to the intended meaning of words. The approach induced by the concept of legality begins and ends with words and has, as its objective, the discovery of the "true meaning" of those words.

The concept of legality is not up to the task of developing an interpretive framework for the *Constitution Act, 1982.* A subordinate status for law is an inherent feature of that concept. It cannot contemplate supreme law because such law cannot exist under the governing doctrine of parliamentary supremacy. As long as our *Constitution* was an Act of Parliament, it could be fitted into the hierarchy and statute interpretation could be passed off as constitutional interpretation. Condemned legislation was *ultra vires* rather than unconstitutional.

The shift from legislative supremacy to supremacy of the *Constitution* is so fundamental a change, that more is required than adaptation of the approach to interpretation shaped by legality. The difficulty began to emerge in the Constitutional Reference of 1981,[13] where the Supreme Court had referred to it the question of whether provincial consent was required for a constitutional amendment achieved by joint resolution of the Houses of Parliament in Canada followed by an Act of the British Parliament (the old amending procedure). The question was one of fundamental principle for which no answer was provided in any law enacted by a sovereign legislature. It thus anticipated the kind of question the Court would be facing under the new *Constitution* and called for a broader approach to interpretation than the concept of legality offers.

The Court gave two answers, one in law, the other in convention, and it reached the opposite conclusion in each. In law, said the majority, there is no requirement for provincial consent, so that no illegality would attach to the central government's proceeding with the consent of only two provinces out of ten. By implication, the central government could legally go ahead with no provincial consent at all. According to convention, however, a majority was of the opinion that a substantial measure of provincial consent was required, so that it would be unconstitutional for the central government to proceed with only two provinces consenting.

The Court used the word "unconstitutional" to characterize action contrary to convention. This was an important recognition of a difference between unconstitutional action and illegal action.

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[13] *Patriation Reference* or *A.-G. Manitoba* v. *A.-G. Canada* (1981), [1981] 1 S.C.R. 753, [1981] 6 W.W.R. 1, 125 D.L.R. (3d) 1.

Judicial minds are set in the mold of legality, and their response to a real question of constitutionality that could not be avoided through the doctrine of parliamentary supremacy was to shift to the different mode of thinking permitted by the concept of convention. Legality produced a sterile approach because it generated a search for text and specifics. Convention allowed a looser approach, a search for evidence of a guiding principle that applied to the question. Even there, though, the majority got it wrong by treating instances of conforming conduct as the equivalent of precedents rather than as evidence of a governing principle. The two judges who dissented from the opinion on law got it right by going straight to the principle, federalism, and treating it as so clearly a fundamental principle of the *Constitution*, as to be judicially enforceable irrespective of past conduct of governments.

There is a lesson here for interpretation of the *Constitution Act, 1982* with its broad standards and supremacy clause. It is probably a fair inference that all nine judges understood that it was contrary to fundamental principle for the central government to proceed with constitutional amendment without provincial consent. Their differences arose over whether they could intervene, and how. The main problem seems to have been the entanglement of their minds with the concept of legality that goes with a system of parliamentary supremacy. Only two of the nine judges were able to break free from the hold of that concept by perceiving that the question referred to them transcended the boundaries of legality. They saw the question as one of not just legality, but constitutionality, for which there was a standard suitable for judicial enforcement. Had they carried a majority with them, the case could have become the start of a transition to a conscious theory of constitutional interpretation under a supremacy clause. The case may still provide some clues.

What led the judges to move from law to convention was their sense that legality could not respond directly to such a broad standard as federalism. Legality required some textual elaboration of the standard, such as sections 91 and 92 of the *Constitution Act, 1867* dividing legislative powers between the central and provincial legislatures. The shift from law to convention allowed the judges to see the question in terms of legitimacy, a concept that responds to broad standards like federalism, the rule of law, and fundamental

justice. Legitimacy is probably the dominant concept of international law, which works primarily with a small number of basic principles, as does the *Constitution*. The lesson of the Constitutional Reference of 1981 is that we should prefer legitimacy over legality as the concept through which to develop an approach to constitutional interpretation.

"Legal" means in accordance with the law or authorized by law. It finds its standards in statute law or precedent. It assumes legitimacy in the sovereign body that emits laws. The new *Constitution* with its supremacy clause has removed the assumption of legitimacy and has introduced standards for judicial review of all government action. The resulting questions of constitutionality are better understood as questions of legitimacy rather than as questions of legality.

One's choice of concept in legal theory goes far to determine approach and result. The famous Hart-Fuller debate[14] about the status of Nazi laws was really a conflict between different concepts. Professor Hart preferred the concept of legality provided by the dominant theory of positive law. This led him to conclude that Nazi laws, however repugnant, must be accorded the status of laws if they have been enacted in accordance with the internal law-making rules of the German state. Professor Fuller took issue. In his view, there were universal standards to be met before a law could be valid at all. Fuller approached the question through the concept of legitimacy, a more open concept that operates beyond the domain of legality. Legality assumes the legitimacy of the acts of legislatures because they are sovereign bodies. Constitutionality considers legitimacy to be open to question because a supremacy clause attributes sovereignty to the people, whose constitution it is. The *Constitution* sets out standards of legitimacy for government, and the *Charter*'s standards could be described as the essential conditions on which a free and democratic people agree to submit to the authority of government. When governments fail to observe those standards, they lose their legitimacy or act unconstitutionally. Questions of

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[14] The Hart-Fuller debate is found in two articles in the Harvard Law Review of 1957-58: H.L.A. Hart, "Positivism and the Separation of Law and Morals" 71 Harv. L.Rev. 593, and L. Fuller, "Positivism and Fidelity to Law – A Reply to Professor Hart" 71 Harv. L.Rev. 630.

legality, as we have known them, do not arise until legitimacy has been established or conceded.

The *Charter's* use of rights formulations invites the approach of legality. It is therefore important that judges settle in their own minds the theory of the *Constitution Act, 1982* before committing themselves to a model of interpretation. If they conclude that the *Charter* is a list of rights and freedoms in form only, and in substance a set of standards for government, they may conclude that their status as supreme law can best be assured if they are seen as standards of legitimacy.

An example of the effects of approaching interpretation in terms of enforcing standards of legitimacy rather than adjudicating legal rights is the elimination of the need for a "political questions" doctrine. That doctrine excludes certain questions from judicial review because they are not "legal" questions. The explanation given is usually that the matters in question are committed by the *Constitution* exclusively to non-judicial branches of government or are not amenable to judicial methods of decision. The latter explanation begs the question of whether judicial methods need modifying to match constitutional responsibility.

The introduction of a supremacy clause, in principle, renders all government action subject to judicial review. Perhaps the better explanation for non-intervention in a particular case would be that the *Constitution* provides no applicable standard of legitimacy. That explanation is anchored squarely in the *Constitution* whereas the conclusion of no justiciable issue may be derived from the "inherent" character of judicial power, a source that may be unreliable at a time of fundamental change in judicial responsibility.

The American apportionment cases provide a helpful illustration of this problem. If the claims are thought to be based on the right to the equal protection of the law, it seems obvious that they cannot be sustained. Common experience tells us that electoral districts cannot be drawn according to the rule of one man, one vote. That rules out equality as an applicable standard unless the court is prepared to engage in the risky business of working out approximations of equality. The proper standard to apply may be that of the representational principle, which is less dependent on numbers than is equality. The question is then seen in terms of whether the election laws produce disparities between districts so

great as to violate the representational principle that is central to democratic government. The Court, in finding this to be the case, would be enforcing a standard of legitimacy, not just enforcing an individual's right to vote. It was the presentation of apportionment cases as cases involving equality rights that led to extensive discussion of the "political questions" doctrine. That discussion, which obscures rather than clarifies constitutional interpretation, could have been avoided if the court had rejected the equality rights rationale at the outset and had made it clear that the representational principle, although not formulated as a particular right, provided the applicable standard of legitimacy.

The cruise missile case in the Supreme Court of Canada should have begun and ended with an insistence that the claimant specify the standard of legitimacy it was asking the court to enforce. If there *was* an applicable standard, it was that of fundamental justice. For reasons stated earlier, the right to life, liberty, and security of the person does not contain an enforceable standard of legitimacy. It is declaratory of the essence of a free society to which the standard of fundamental justice is applicable. The argument in the case should have been about whether the decision to permit testing of the cruise missile over Canada was such a potential threat to the life, liberty, and personal security of Canadians that fundamental justice required something more than cabinet deliberations and a parliamentary committee hearing. In order to succeed, the standard of fundamental justice would have to be brought to bear on a question of real doubt as to the authority of the federal cabinet to make the decision without express legislative authority. If such doubt existed, and the claim to something more than cabinet deliberations and committee hearings was clearly justified, then legitimacy would require special legislation, bringing into play the full legislative process.

In the end, the *Charter* turns out to play a rather modest role at best in relation to exercises of federal executive power in matters of foreign relations and defence. That role is to swing the balance in cases of real doubt as the legal authority to make the decision in question. Fundamental justice, by itself, lacks the force to deny legitimacy to a cabinet decision falling within the constitutional authority of that executive body. It is an applicable standard of legitimacy, but where constitutional lines of authority are

clearly drawn, its function is to enforce and reinforce those lines, not to change them. Fundamental justice is not a standard at large. It is loosely structured by our constitutional history and contemporary standards of public morality and international law.

The rights-based view of the *Charter* induced by the concept of legality led counsel in the cruise missile case to use section 7 as a battering ram rather than a lever. If the *Charter* is approached as an important original source of law whose provisions are more concerned with standards of legitimacy than legal rights, the document can have a pervasive and salutary effect on our legal system, and an educative value for all. Treating it as just a catalogue of new legal rights will generate many precedents, but probably at the price of losing its real potential as an original source of law.

VI. CONTEXT

We invent and control doctrine, but not facts, and this seems to influence our treatment of the two. The view reflected by legal scholarship is one of settled doctrine brought to bear on unique situations. The facts considered are the facts of the case. There is little evidence of awareness of the world of contextual fact in which doctrine takes its effect, or of the possibility that context deserves systematic treatment as much as doctrine does. With the sole exception of the scholarship of Harold Lasswell and Myres McDougal,[15] there has been no recognition of a coherent world of contextual fact within which legal doctrine operates, and no systematic attempt to wed the two into a common framework of

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[15] The core of this scholarship is a course called "Law, Science and Policy: A Jurisprudence for a Free Society" which was taught at Yale Law School over a period of two decades, mostly to graduate students. Unfortunately, the materials for this course have never been commercially published. Lasswell and McDougal considered it essential that legal scholars adopt an observer's standpoint and draw on other disciplines in trying to understand and guide processes of decision. The collaboration of these two men with other scholars produced a number of policy-oriented studies of law, the best known of these being M.S. McDougal & W. T. Burke, *The Public Order of the Oceans* (New Haven & London: Yale University Press, 1962), (dedicated to Harold Dwight Lasswell), and M.S. McDougal, H.W. Lasswell & I.A. Vlasic, *Law and Public Order in Space* (New Haven & London: Yale University Press, 1963).

inquiry. The result is a tendency to look to doctrine for *answers*, as though it were a closed system of truths, independent of the world of fact.

A good framework of inquiry that interprets doctrine as policy and surrounds it with relevant information offers no answers, but presents interpretation as a matter of asking the right questions to obtain the policy guidance and factual information needed to reach a sound decision. To the extent that facts are contextual to policy and not specific to a particular case, they should be integrated into the process of interpretation.

In a rule-bound conception of law, doctrine is independent of context. The doctrinal treatise is in theory a book of answers. The refinement of analysis through sustained Herculean effort will ultimately yield the right answer to any question. However, pure doctrine persists in producing "right" answers that offend that strange form of human radar, the sense of justice. Mrs. Murdoch's failure to satisfy the requirements of trust doctrine for a share of the matrimonial home is a case in point.[16] When the disparity between doctrinal truth and justice becomes too great, we are open to some contextual fact on the side. In the aftermath of Mrs. Murdoch's case, the input of contextual fact concerned the status of women in Canadian society, a reality from which judges had apparently been insulated. If the judges had been using a good contextual approach to legal analysis, they would not have made the mistake they made in the *Murdoch* case. The importance of context is greatest in constitutional interpretation because of the generality and abstract nature of much of the text, especially that of the *Charter*. The potential damage from neglect of context is great.

The law-and-economics movement has been largely an attempt to allow common law doctrine some direct access to economic fact and analysis. Judges who are influenced by the writings produced by the movement are really taking judicial notice of matters of fact and expert opinion. This ensures some kind of contextual approach to legal interpretation. However, compared to the treatment of doctrine, it is very haphazard.

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[16] *Murdoch* v. *Murdoch* (1973), [1975] 1 S.C.R. 423, [1974] 1 W.W.R. 361 [hereinafter *Murdoch*].

Judicial notice, whether declared or not, is probably the main channel through which context enters the process of interpretation. The admission into evidence of an economic study or a Brandeis Brief is exceptional. The reason for this seems to be our rigid insistence on formal proof and rules of evidence for all factual material and expert opinion. Contextual fact is officially regarded in the same way as specific facts in dispute in a particular case. The result is that necessary contextual fact comes in through the back door of judicial notice, with little assurance that it is complete and reliable or that it is not ideology in disguise. This situation will persist until we learn how to integrate contextual fact into legal analysis. The need for such integration is greatest in constitutional interpretation, and the challenge of the new supremacy clause and *The Charter of Rights and Freedoms* provides the occasion. We are all searching for new directions.

The need for contextual facts is most obvious in relation to aboriginal rights. There is no common experience to draw on. Interpreters must be carefully and systematically informed about aboriginal culture if a repetition of history is to be avoided. Nowhere is this need more apparent than in recent Supreme Court decisions concerning aboriginal hunting and fishing rights. The constitutional doctrine of adoption of legislation by reference has been taken from the context in which it was developed and applied in a way that permits the Parliament of Canada to abandon its responsibility for aboriginal peoples to the provinces on a wholesale basis. Legal doctrine detached from context permits the judges to ignore completely the important historical evidence showing that the federal responsibility for Indians is touched by a special charge to protect the aboriginal peoples and their cultures, a charge that is traced from the very beginning of British rule. When doctrine is denied the guidance of a contextual approach, the fundamental rights of a minority culture can be treated as no more important than the right of federal carriers to be regulated by laws enacted by the federal legislature.

The entrenchment of aboriginal rights in Section 35 of the *Constitution Act, 1982* may force us to learn a balanced scholarship that blends policy and contextual fact into a common framework of inquiry to serve constitutional interpretation. If the policy of section 35 is to stop trying to run aboriginal people's lives and communities

for them, then the questions we must ask take us beyond doctrinal sources to the most complete and reliable factual sources we can find. These facts are to section 35 what a general knowledge of Canadian history and culture are to the *Charter*. However, because they cannot be taken for granted as part of the common experience of the judges, they serve well to illustrate the general importance of a contextual approach.

It is unlikely that a body of scholarship that treats contextual facts as systematically as doctrine will emerge on its own. There is no market for it. What is more likely is that Supreme Court judgments will increasingly take this form as the *Charter*'s need for context convinces the judges that the haphazard treatment of contextual facts will no longer do. It is already apparent that the judges need and want something more than the old doctrinal approach with its recital of settled truths and citation of precedents. The Court should take the lead by giving us constitutional interpretations that can serve as models of the contextual approach needed to be developed systematically in constitutional scholarship.

VII. PRECEDENT

In the common law system, precedents are sources of law. Constitutional interpretations cannot be precedents in the same sense because the Constitution itself is the source. However large the body of previous interpretations, interpretation must always begin at the source. This is also true for statutes, but no harm has resulted from the practice of treating statute interpretations as though they were common law precedents so long as they were looked to only for rules of construction. But that has not always been the case. Cases interpreting statutes are too often treated as though they were sources of law whose elaborations of statutory language are annexed to the statute, like amendments, fixing the meaning for all times and places. Interpreters are gradually denied direct access to the statute itself, and thus denied the opportunity to read the language in context. They are given packaged meanings in "precedents," to which they unconsciously apply the doctrine of *stare decisis*. This practice induces a belief that there is a single, correct interpretation of every statutory provision. This view, however, was

recently abandoned by the Supreme Court of Canada. It recognized that an administrative interpretation of a statute might differ from a judicial one, but still be right for administrative purposes.[17] That was a significant insight into the importance of the interpreter's perspective, that is, his view of the purposes of the document and the context in which he sets the questions. It might lead to the further insight that different judges in different times and places might reach different conclusions about the best way to achieve the purposes of a constitution. Interpretation needs a whole view of document and context. It cannot be packaged in precedents.

The harm that would result from treating constitutional interpretations like common law precedents would be much greater than in the case of statutes and could not be overcome by legislative amendment. The integrity of statutes can be protected by drafting them in detail and by using ordinary language. A constitution, on the other hand, is necessarily concise and general, making it vulnerable to fragmentation. It is predictable, for example, that absent a change in our thinking, there will develop around the term "fundamental justice" a large body of cases which will gradually replace the *Charter* as the primary frame of reference for interpretation. In time, fundamental justice will cease to be a standard of decision. It will be replaced by the formulations in the "precedents" because of the place of pride accorded precedent in our muddled theory, giving it a powerful hold on judicial minds.

Writ large, the same process will produce volumes of cases that will be treated as "precedents" in the emerging field of "Charter Law." This is the wrong road for the *Constitution Act, 1982.* It is an important new source of law that must be allowed to speak for

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[17] The change in policy came in the decision in *Service Employees' International Union, Local No. 333* v. *Nipawin District Staff Nurses Association* (1974), [1975] 1 S.C.R. 382 at 389, 41 D.L.R. (3d) 6 at 11, where Dickson, *J.* stated of a labour relations board ruling that a staff nurses association was a company dominated organization, "... if the Board acts in good faith and its decision can be rationally supported on a construction which the relevant legislation may reasonably be considered to bear, then the Court will not intervene." This was notice to lower courts that they should no longer "correct" statute interpretations made by statutory tribunals by substituting their own views as to the proper meaning of the language of the statute. The case most recently cited for this new stance of judicial deference to specialized tribunals is *Canadian Union of Public Employees, Local 963* v. *New Brunswick Liquor Corp.* (1979), [1979] 2 S.C.R. 227, (1980) 97 D.L.R. (3d) 417.

itself, in a whole voice. However large the body of interpretations grows, the interpreter's first loyalty is to the document and its language. This cannot be accomplished until the hold of precedents on judicial thinking is broken, and for that we need an alternative model of interpretation. We begin by asking why the legal approach will not work.

First, the *Constitution* is not law in the usual sense. It is true that it is made supreme law by section 52 of the 1982 document, but that is meant to confirm its primacy, putting it above the legal system that it contains. The *law* prescribes standards of legality for resolving conflicts that arise within the system. The *Constitution* prescribes standards of legitimacy that govern the way the system works. It is an attempt to express in words a preferred theory of government. Legal language is not well suited to that purpose, but an awareness of the nature and purpose of the document will enable us to penetrate the rights formulations and see it as a coherent set of related standards.

Second, the legal method derived from the common law succeeds mainly by isolating problems and treating them as narrowly as possible. The *Constitution*'s thrust is in the opposite direction towards systematic treatment of principles within a whole view of their context.

Third, the *Constitution* now clearly derives its authority from the people. This is an important change in theory, and it is no longer acceptable to assert that meaning can be found in the language alone. The new *Constitution* is valid because it is accepted by the people as an appropriate set of standards of legitimacy. The consent to be governed depends upon governments observing those standards. If they do not, their resulting acts create no obligations on citizens. It is this crucial matter of obligation to comply with law that judges must decide in *Charter* cases. The common law's "micro" approach to disputes fails to do justice to this high judicial function.

If the *Constitution* is the basic understanding between the people and their government, then its interpretation should be intelligible to the people. Interpretations should accordingly be founded in the language of the *Constitution*, shaped by a whole view of the document and structured around principles. The *Constitution* is not a technical body of rules but a system of values. The aim of interpretation is not to extract doctrinal truths, but to infer purposes

and develop policies for advancing those purposes. The consequences of different interpretations are highly relevant as measures of success or failure in achieving purposes. Doctrine affects indifference to consequences and measures success or failure in terms of conformity with settled truths. That is why doctrine is so often treated in isolation from context, and why doctrine's way of thinking is not suited to constitutional interpretation.

To free our minds from the mold of doctrinal thinking we must overcome the tendency to see the *Constitution* as a kind of "superstatute," to be interpreted by the same methods as are used for statutes. The document expresses a theory of government, a set of political principles, and its interpretation calls for explanations in terms of principles. Rather than proceeding downwards through the language to specifics, we should proceed up to principles and then develop policies for harmonizing those principles through contextual analysis. We must abandon the myth that answers are arrived at through linear reasoning from fixed truths. What we are doing is making difficult judgments about complex matters for which there are no answers. Policies express preferences, and context enables us to observe cause and effect and to predict consequences within the limits of human understanding. That is the best we can do.

VIII. POLICY

One of the *Charter*'s main policies is a preference for personal autonomy over state coercion. The strongest expression of this policy is freedom of conscience, which is new to our constitutional vocabulary. While it is joined to freedom of religion and might appear to be just a secularization of that older freedom, it is really of a different kind. The path to 1982 began with forced observance of a state religion, then moved to a yielding to the church of authority over morality, and finally to a recognition of personal autonomy in matters of morality. However, we continued to equate morality with religion; conscience and religion were inseverable in our understanding of things. (An aboriginal person would be forgiven for observing that only the white man could define freedom in terms of a struggle between two authorities, church and state, for the hearts and minds of people.)

Freedom of conscience should be given a life of its own and treated as a serious attempt to capture the essence of the greatest political movement of our time, the drive to end coercion as a way of life. Compared to many other countries, Canada is remarkably free of state coercion, but it is unlikely that non-coercion is so thoroughly instilled in the national consciousness and in our institutions that we can relax our vigil. New possibilities for coercion arise with each major advance in technology. Freedom of conscience may in time become the kind of bulwark of a free society that freedom of speech was in the early days of democratic government.

For the first time we are presented with a constitutional ethic of personal responsibility. There is no external authority – no church, no state, no corporate or collective body – giving us marching orders. Just ourselves. Perhaps this is the true essence of a free and democratic society. We are responsible for the choices we make in the exercise of freedom. The sooner we stop deceiving ourselves on that score, the sooner the *Charter* can become a shared vision of society rather than a battleground for sterile ideological debates. It becomes the Supreme Court's mission, then, not to moralize, but to indicate the trade-offs between personal responsibility and state coercion as a major policy theme of the *Charter*. The more we surrender our personal autonomy to external forces, the greater the level of state coercion required to preserve the whole *Constitution*.

This may sound like wild speculation to those with conventional ideas about constitutional interpretation, but in fact it is obvious policy analysis. It requires only a little knowledge of history to infer from the *Charter* a major concern with state coercion. While this policy does not by itself resolve concert disputes, it does provide a sound starting point and continuing direction for analyzing those disputes in context. Policy analysis keeps us continually aware of the purposes we are pursuing and of context and trade-offs being made. It also produces interpretations that can be understood by the people, whose collective and individual self-determination depend upon a thorough understanding of the *Constitution* and how it works. The people cannot govern themselves if that understanding is withheld from them.

The constitutional treatise of the future should be organized around major policies that emerge from a purposive reading of the document, and should develop these policies in their full context. The time we now spend in creating, gathering, and digesting verbal formulations can be diverted to formulating questions and integrating contextual facts with policy analysis.